88-880

Supreme Court, U.S.
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NO.___

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

LUCILLE J. BOSTON, PETITIONER

v.

ELIZABETH STEPHENS NELSON, RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE INTERMEDIATE COURT OF APPEALS OF THE STATE OF HAWAII

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QUESTION PRESENTED

Whether Hawaii law by allowing arbitrary awards on the amount of deficiency judgments in foreclosure actions violates the due process clause of the Fourteenth Amendment.

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PETITION FOR WRIT OF CERTIORARI TO THE INTERMEDIATE COURT OF APPEALS FOR THE STATE OF HAWAII

The Petitioner, Lucille J. Boston, respectfully petitions for a writ of certiorari to review the judgment of the Intermediate Court of Appeals of the State of Hawaii.

OPINIONS BELOW

The Memorandum Opinion of the Intermediate Court of Appeals of the State of Hawaii (App. A, *infra*) is not reported. The Order of the Supreme Court of Hawaii denying a Petition for Writ of Certiorari (App. C, *infra*) is not reported.

JURISDICTION

The judgment of the Intermediate Court of Appeals of the State of Hawaii (App. A, *infra*) was entered on April 19, 1988. The Hawaii Supreme Court denied petitioner's Petition for Certiorari on May 31, 1988 (App. C, *infra*). The jurisdiction of this Court is invoked under 28 U.S.C. 1257(3).

STATUTORY PROVISION INVOLVED

Section 667-1, Hawaii Revised Statutes, provides in pertinent part:

> *Foreclosure by action.* The circuit court may assess the amount due upon a mortgage, whether of real or personal property, without the intervention of a jury, and shall render judgment for the amount awarded, and the foreclosure of the mortgage. Execution may be issued on the judgment, as ordered by the court.

STATEMENT OF THE CASE

The case arises out of the purchase of a condominium unit located in the Island of Maui, State of Hawaii, by Petitioner from Respondent. Under the terms of the Agreement of Sale,[1] in January, 1981, after Petitioner had made all of her monthly payments in a timely fashion, she owed Respondent a balloon payment of $97,562. She was not able to obtain the financing to make that payment. She continued, however, to make monthly payments through April of 1981 and unsuccessfully sought an extension of time in which to make full payment. In April 1981, Respondent filed suit for foreclosure against Petitioner, and named as well the first mortgage holder (Standard Federal Savings and Loan Association) and the condominium association which had a statutory right to collect maintenance fees during the pendency of the litigation. In response, Petitioner filed counterclaims, crossclaims, and a third-party claim against the real

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1 An Agreement of Sale is a financing device offered and used in Hawaii real estate transactions under which there is a contract to purchase real estate with a certain amount down and the remainder to be paid at a certain time in the future. The terms of this particular Agreement of Sale were $32,500 down and the balance of $97,500 due one year later with interest-only payments due in the interim.

estate agent who had, by misrepresenting facts, encouraged her into acquiescing to this real estate transaction.[2]

The trial court found that some facts concerning the sale had been misrepresented but did not find them to be material and rejected Petitioner's claims, finding her liable under the Agreement of Sale and granting foreclosure. At the foreclosure auction the sale of the condominium unit netted $96,091. This was only $879 less than needed to pay off the balance due under the Agreement of Sale. However, the Court awarded a deficiency judgment against Petitioner for $110,089. This consisted of the amount due under the Agreement of Sale ($34,563.52), attorneys' fees and costs ($59,038.47),[3]

The deficiency judgment was appealed to the Hawaii Intermediate Court of Appeals where Petitioner challenged both whether the procedures and trial court's decision provided Petitioner with due process and whether it was proper to apply Hawaii law granting deficiency judgment rather than the law of the state of which the parties were citizens. On the conflicts issue, the Hawaii Court of Appeals ruled against Petitioner relying primarily on its recent decision in *California Savings and Loan Association v. Bell*, _____ Haw. App. _____, 735 P.2d 499 (1987), where it held that Hawaii law allowing deficiency judgments would apply to real estate transactions involving Hawaii land. Its opinion did not address the due process clause argument.

A Motion for Reconsideration was filed based on *Bell, supra.* Petitioner argued that under the *Bell* decision no deficiency judgment should be awarded. In Bell, the Court ruled that equitable considerations, not the literal terms of a contract between the parties, govern the amount of any deficiency judgment and vacated the entire deficiency judgment awarded. The situations in *Bell* and Petitioner's cases were so similar (if anything the equitable considerations favor-

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2 Claims with all of the parties, other than those between Petitioner and Respondent, have all been settled.

3 Respondent had asked the trial court to apportion attorneys' fees engendered by the case between herself and Petitioner. All parties agreed, including Respondent Nelson, that Respondent Nelson was liable for at least a portion of these fees and had caused some of these fees. Specifically, the Association argued:
(Footnote continued on next page)

ing Petitioner were greater than those favoring Bell) that if no deficiency judgment was awarded in *Bell*, it would be inequitable to award one against Petitioner. The Motion for Reconsideration was denied without comment. (App. B, *infra*)

Petitioner filed a Petition for Writ of Certiorari to the Hawaii Supreme Court on May 20, 1988. In that petition the same due process claims were raised. The Court was also asked to review the entire case including the decision applying Hawaii law to parties who were citizens of states which did not allow deficiency judgments. The Petition for Writ of Certiorari was denied by the Hawaii Supreme Court on May 31, 1988. (App. C, *infra*)

(Footnote 3 continued)

> It was Plaintiff's [Nelson's] own refusal to pay the amounts due and owing to the Association which forced the Association to intervene in the subject proceeding to enforce its lien and foreclosure rights. Stated otherwise, Plaintiff [Nelson] could have avoided liability for the attorneys' fees and costs incurred by the Association by curing the subject maintenance fee delinquency, as allowed under her Agreement of Sale with Boston. (R. 1263.)

The mortgagee, Standard, argued:

> Plaintiff [Nelson] violated the due-on-sale clause of the mortgage and but for plaintiff's default under the mortgage, Standard would not have incurred these fees. *Standard's memorandum in opposition to Nelson's motion to apportion fees.* (R. 1027-1040, R. 1209-1215.)

After taking all this into consideration, *the trial court supported Petitioner's position* and found that no apportionment should be made of the attorneys' fees. The Court ruled:

> The suggestion by plaintiff Nelson that the attorneys' fees requested by intervenor/defendant Association be allocated on the basis of HRS [Section] 607-14 to plaintiff Nelson in the amount of $822.63, and the balance to defendant Boston is rejected on the ground, among others, that *plaintiff Nelson could have avoided the Association's requested attorney's fees by curing the maintenance fee delinquency* as was allowed under the agreement of sale between plaintiff Nelson and defendant Boston.
>
> The suggestion by plaintiff Nelson that the attorneys' fees requested by defendant Standard Federal be allocated on the basis of HRS [Section] 607-14 to plaintiff Nelson in the amount of $1,412.40, and the balance to defendant Boston is rejected on the ground, among others, that such an allocation will destroy defendant Standard Federal's standing as a secured creditor. (Emphasis added.)

In total contradiction with its own rulings and apparent total contradiction with Hawaii law which limits fees to no more than 25 percent of the contract amount, the Court nonetheless awarded attorneys' fees totalling over $59,000 (more than 60 percent of the amount in dispute) against Petitioner.

REASONS FOR GRANTING A WRIT OF CERTIORARI

Residential real estate and residential real estate mortgages throughout the country, but particularly in Hawaii, have become a primary mode for both interstate and international investment. Investors throughout the world need clear guidelines to establish the rules and laws under which they make such investments. Under Hawaii law as it presently stands, arbitrary decisions as opposed to law govern deficiency judgments which are incident to foreclosure proceedings. The lack of clear notice of one's rights and responsibilities is so extreme that it amounts to a denial of the due process clause of the Fourteenth Amendment.

This Court is asked to reject as a due process violation Hawaii's arbitrary system for allowing deficiency judgments and either establish or require the Hawaii Courts to establish some clear constitutional guidelines by which interstate and foreign investors can fairly evaluate, not only their real estate investments, but what actions they should take during foreclosure proceedings.

I. CONSTITUTIONAL SAFEGUARDS ARE APPLICABLE TO RESIDENTIAL REAL ESTATE INVESTMENTS

A. *The Home Mortgage Has Changed From a Local Banking Transaction to an International Investment Vehicle*

As this Court has noted recently the process of residential mortgage foreclosure involves a substantial property interest which must be accorded due process safeguards. *Mennonite Board of Directors v. Adams*, 462 U.S. 791 (1983). This need is international in scope. Until recently, residential real estate was generally held by the families that lived in the home and for whom the purchase of a home was a once in a lifetime investment. However, in the last thirty years residential real estate has become a standard mode of investment for those looking for long-term appreciation as well as return on their investment, as opposed to purchasers buying a home for themselves and their family. Also the national secondary market in home mortgages has become a primary investment vehicle for those

seeking secure return on capital. *See generally*, Eskridge, *One Hundred Years of Ineptitude: The Need for Mortgage Rules Consonant with the Economic and Psychological Dynamics of the Home Sale Loan Transaction.* 70 Va. L. Rev. 1083-1218 (1984).

The importance of residential sales as an investment vehicle is particularly true in Hawaii, and other popular resort areas, where residential real estate is viewed as income property and put into rental pools such as was the case here. [4] Indeed, the change in the residential market is exemplified by the fact that condominiums, which form the primary mode of new real estate development in the State of Hawaii, were not even developed as a legal institution until the late 1950's and early 1960's. The net effect is that residential real estate transactions and mortgages which used to be a lifetime investment for a family and a local bank, are now part of an international market, competing with the stock market, treasury notes and other investment vehicles for funds.

When residential real estate was primarily viewed as the family house instead of a commercial (and often speculative) investment, the foreclosure rate was low, and few buyers were out-of-state, much less international, investors. For this reason mortgage foreclosures were properly seen as an aspect solely of local law. However, in today's market residential real estate investments are often between parties who have no relationship to the forum in which the real estate is purchased, as is the case in this transaction. For instance, in this case the seller was a resident of the State of Washington and the buyer was a resident of the State of California. The real estate contracts in question were executed in Washington and California by the parties. Persons using residential real estate as an investment vehicle rather than as their homes are much more likely to go into foreclosure (i.e. abandon a bad investment). In such cases interstate and foreign in-

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4 This Court has already noted the importance of residential real estate in Hawaii by accepting jurisdiction in *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229 (1984). In that case the Court ruled that a law under which the State of Hawaii condemned land owned by the large Hawaii landholders, in order to force them to sell the fee interest in that land to those persons holding leasehold interests in the property, was constitutional.

vestors are dependent on the local courts with whom they may have no familiarity and from whom they run a real danger of getting a "hometown" decision. For this reason due process is of great concern in such cases.

Hawaii law governing deficiency judgments as it presently stands is virtually non-existent and can lead to decisions which are totally arbitrary and contradictory. The local court is free to do virtually whatever it wills with the party in foreclosure, with the law providing no clear guidance for parties who are in foreclosure, and no notice of what they need to do, or what the law is.

The Court is asked to step into this void and set up constitutional guidelines or to reverse and remand this case to Hawaii courts to establish definite, clear guidelines in harmony with due process. Specifically, a guideline should be established which adequately informs the courts and the parties what the "equitable considerations", (which Hawaii law says should be taken into account in granting deficiency judgments)[5] are to be considered. In this case, such considerations were either not taken into account, or, if they were, were subject to such arbitrary application as to lack the basic rationality required to meet substantive due process limitations.

The essence of due process is to allow a party over whose property the state exercises jurisdiction to be heard at a meaningful time and in a meaningful manner. *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965). Here with no guidelines it is impossible for a party to respond in a meaningful manner. For instance, here the trial court held that certain of the attorneys' fees were not the fault of Petitioner but instead caused by Respondent under a contract to which Petitioner was not even a party. Yet in its final order the trial court nonetheless arbitrarily assessed those fees against Petitioner. Another example here was the disregard or incorrect application of a statute applying to deficiency judgment which limits attorneys' fees to 25 percent of the underlying amount, but in this case the trial court awarded fees of 60 percent against Petitioner, which was upheld on appeal. Without some principled structure to the law, and some notice of what the law

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5 *California Savings and Loan Association v. Bell, supra.*

is, mere notice of the fact that a proceeding is taking place simply does not satisfy due process.

To correct this lack of due process the Court is asked to have the Hawaii courts provide substantive and procedural due process in the form of law that is not completely arbitrary. Even if one considers that procedural due process is a flexible standard as noted by the Court in *Matthews v. Eldridge*, 424 U.S. 319 (1976), arbitrary rules are not permitted. Applying the *Matthews* test the Court will find that all three factors cited by the Court in *Matthews*, evaluating procedural due process, are applicable here and favor reversal. Here the property interest affected in substantial. *Mennonite, supra.* The risk of erroneous deprivation if no guidelines exist is also substantial, and the government interest favors some substantive guidelines for families and investors.

Petitioner recognizes that due process is a flexible concept related to the time, place and circumstances involved. *Cafeteria Workers v. McElroy*, 367 U.S. 886, 895 (1961). But the lack here of any meaningful standards does not meet even the most flexible test. For this reason the Court is asked to either set forth the standards or require the Hawaii courts to establish them. Such guidelines will give parties to real estate transactions throughout this country a lodestone by which to guide themselves in commercial real estate transactions rather than being solely at the mercy of the local courts, whether in Hawaii or elsewhere.

II. DUE PROCESS REQUIRES NOTICE TO THOSE INVOLVED IN THE JUDICIAL SYSTEM OF THEIR RIGHTS, LIABILITIES AND RESPONSIBILITIES

Notice of one's potential liability is an essential element of due process. In *Mullane v. Central Hanover Bank and Trust Company*, 339 U.S. 306, 313 (1950), the Court observed that due process requirements:

> "...of the United States Constitution require, at a minimum, that deprivation of life, liberty *or property* by adjudication be preceded *by notice and opportunity for hearing appropriate to the nature of the case...."*

> "An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice, reasonably calculated, under all circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. The notice must be of such a nature as to reasonably convey the required information." (Citations omitted and emphasis added.)

The court reaffirmed the importance of adequate notice as to the penalties that one might face under the law or defense remedies to be provided in *Lambert v. State of California*, 355 U.S. 225, 228 (1957):

> "Ingrained in our concept of due process is a requirement of notice. Notice is sometimes essential so that the citizen has a chance to defend charges. Notice is required before property interests are disturbed, before assessments are made, before penalties are assessed. Notice is required in a myriad of situations where penalty of foreclosure might be suffered for mere failure to act."

It is Petitioner's position that the arbitrary nature of Hawaii law as it relates to deficiency judgments is violative of substantive and procedural due process. Petitioner and all others involved in foreclosure proceedings have no real notice of the ultimate and reasonable penalties involved, and no clear legal statute or precedent by which to guide their conduct. For this reason, Hawaii law is so lacking of any such guidelines as to violate due process. This conclusion is demonstrated in this case most clearly by two facts:

> (1) Hawaii statutes state that the maximum liability for attorney's fees is *25 percent* of the amount at issue, and that a party has the absolute right to bring all of one's defenses before the Court without penalty. Yet in this case Petitioner was assessed attorneys' fees of *60 percent*. The lack of relationship is exacerbated in this case because the lower court especially recognized that Petitioner was not responsible for at least a portion of the fees she was assessed.
>
> (2) The Hawaii courts have as their rule that equitable considerations govern the extent to which deficiency judgments will be awarded, yet in this case, the Hawaii courts did not even

give lip service to this requirement, instead simply assessing every conceivable cost against Petitioner.

A. *Hawaii Statutes Provide Insufficient Notice to Conform to Substantive Due Process*

1. *Lack of Clear Statutory Standards*

Hawaii statutes do not specifically authorize or even mention deficiency judgments. Instead deficiency judgments in Hawaii are a product a judge-made law premised solely upon the Court's interpretation of Hawaii Revised Statutes, Section 667-1, which makes no explicit reference to a deficiency judgment but only gives the court power to make judgments "incident to foreclosure". In *Bank of Honolulu v. Anderson*, 654 P.2d 1370, 1374 (Haw. App. 1982), this statute was construed as conferring "specific authority to render a deficiency judgment as an incident to the foreclosure."

There is no case law or legislative enactment defining the scope of deficiency judgments or their basis or otherwise providing notice to litigants of the potential that a deficiency judgment will be entered or guidance as to the amount. There is but a single case which, although it fails to set forth any specific parameters, could be used as a guidepost in determining when deficiency judgments will be granted. *Bell, supra.* However, as will be shown *infra* the decision in this case completely contradicts the court's prior decision in *Bell* leaving the law in this area in complete confusion and as a result completely arbitrary.

2. *Assessment of Attorneys' Fees*

Attorneys' fees of 60 percent were awarded against Petitioner although Hawaii law sets 25 percent as a maximum. The Hawaii Revised Statutes clearly provide limitation for attorneys' fees. Section 607-17 provides:

> 607-17. *Attorney's fees when provided for in promissory notes, etc.*
>
> (1) Where the note or other contract in writing provides for a fee of twenty-five per cent or more, or provides for a reasonable attorney's fee, not more than twenty-five per cent shall be allowed; ...

The assessment of attorneys' fees of 60 percent of the underlying debt not only contradicts the statute, but also directly contradicts the findings of the trial court which held that some of the attorneys' fees were not the fault of the Petitioner but rather the Respondent.

Another pertinent statute determining whether Petitioner had proper notice of the possibility of attorneys' fees of 60 percent being assessed against her is Hawaii Revised Statutes Section 667-4 which provides a statutory right for a defendant to litigate defenses in a foreclosure action. The statute provides:

> "The mortgagor, or any subsequent mortgagee may defend the action for a foreclosure and they shall in any manner in legal or equitable voidance of the mortgage."

This is precisely what Petitioner did. She asserted her legal defenses to the mortgage, and although the lower court found they were not strong enough to win, it did conclude that there was substantial evidence to support them. [6] Yet in what must be considered a penalty for asserting her statutory and legal rights, Petitioner was assessed attorneys' fees of 60 percent -- $34,000 more than the maximum allowed by statute. This is totally contradictory to the statute and thus violative of due process. It is a direct consequence of the lack of any legal guidelines that such results are permitted under Hawaii law.

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6 Among the findings by the lower court were that in the sale in question both Petitioner and Respondent were represented by the same realtor. That dual agent made representations of fact which were not correct as to the value of the apartment. The record also shows that unusual practices were followed when the agreement of sale was signed and the dual agent signed a counteroffer as Petitioner's agent for which he had no written authorization.

III. THE HAWAII COURT WHICH STATED THAT EQUITABLE CONSIDERATIONS CONTROL THE AWARDING OF DEFICIENCY JUDGMENTS DID NOT APPLY ANY SUCH CONSIDERATIONS IN THIS CASE AND IN FACT DIRECTLY CONTRADICTED ITS PRIOR RULING AS TO THE EFFECT OF SUCH EQUITABLE CONSIDERATIONS LEAVING THE LAW IN THIS AREA COMPLETELY ARBITRARY AND UNCERTAIN

A. *Introduction*

In March, 1987, the Hawaii Intermediate Court in *California Savings and Loan Association v. Bell, supra,* ruled that equitable considerations, not the literal terms of contracts, govern the extent to which deficiency judgments will be granted. In *Bell,* the entire deficiency judgment of $159,690.37 was vacated. In this case, the deficiency judgment was allowed to stand in its entirety.

The Court is asked to examine the award of the deficiency judgment in this case in light of the decision in *Bell.* When it does it will find the decision is completely contradictory and that the law in Hawaii relating to deficiency judgments is left without any legal parameters to guide the judge or the parties. To correct this, this Court is asked to require that some guidelines be established upon which one may, with some objectivity and in harmony with due process, determine how and what equitable considerations will be weighed when fixing the amount of deficiency judgments.

At the moment, as will be seen by contrasting the result of this case and the result in the *Bell* case, there are no guidelines. Indeed, despite the holding in *Bell,* which says that equitable considerations govern deficiency judgments, equitable considerations were never taken into account or even mentioned by the trial court or the Hawaii Intermediate Court of Appeals in setting the deficiency judgment rendered in this case. To right the inequities of this case and establish some guidance to courts and parties to foreclosure actions, a Writ of Certiorari should be granted.

B. ***The Equities Favoring Petitioner In This Case Were Equally Strong As Those Favoring The Appellant In Bell And Yet The Result Is Exactly The Opposite; It Should Be Reconsidered And Some Equitable Guidelines Established For Deficiency Judgments***

In *Bell* the Hawaii Intermediate Court of Appeals completely extinguished the deficiency judgment of $159,692.37, of which $78,252.56 was the balance due the seller under the agreement of sale.[7] In this case, the Hawaii Intermediate Court and the Supreme Court allowed to stand the full amount of the deficiency judgment -- $110,089.61 -- despite the fact that the foreclosure sale yielded sufficient funds to pay off all but $837.18 of the principal due under the Agreement of Sale.[8]

If the Court weighs all the equities, as is supposedly the law under *Bell*, it will find that there is no reason the result in this case and *Bell* should be so diametrically opposed. Indeed, the equities here favor Petitioner more than they did the purchaser in *Bell*. If equitable considerations were the criteria upon which deficiency judgments were awarded, a different result would have been reached or at least such factors would have been mentioned. They were not. Hawaii law as it stands right now, based on this case and *Bell*, have in effect no guidelines on which the parties or the lower courts can base their decisions. That is, and should be found by this Court, to be a violation of due process.

2. ***Petitioner, Unlike The Purchaser In Bell, Made Good Faith Timely Payments Under The Agreement Of Sale, And Had Equity To Protect.***

In *Bell*, the foreclosure yielded $78,252.56 less than the principal balance due on the agreement of sale. In this case the foreclosure yielded $837.18 less than the principal balance due on the agrement

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7 The remainder consisted of interest ($71,923.64) and attorneys' fees ($9,516.17).

8 This amount was realized despite the fact that for the almost 18 months this valuable resort property was under the commissioner's care, it sat vacant, unrented. Had reasonable rental income been received, the sale would have paid not only all of the principal balance but also some of the interest that accrued during this period.

of sale. Here, the bona fides favor Petitioner, who had equity to protect, more than Bell who walked away from a purchase in which she had no equity.

Secondly, and more fundamentally, the purchaser in *Bell* ceased making payments seven months before the balance was due under the agreement of sale. Here, Petitioner continued to make monthly payments five months after the expiration of the agreement of sale. Petitioner, unlike the purchaser Bell, made continuing payments in a good faith attempt to buy extra time to find financing for the balloon payment. Even after Respondent filed this action (in April, 1981), Petitioner made another payment in a last ditch attempt to avoid litigation and foreclosure (R. 892, Paragraphs 75-76). In contrast the purchaser in *Bell* seven months before the balloon payment was due, stopped making any payments and walked away from a bad deal. Certainly, the equities favor Petitioner.

3. *Respondent, Like The Seller In Bell, Violated The Due-On-Sale Clause*

A second equitable consideration the Hawaii Intermediate Court found significant in *Bell* is also present in this case: The seller in each case had breached the due-on-sale clause. In *Bell* this triggered an action by the mortgagee to foreclose the mortgage. In this case it triggered a litigated Counterclaim on the same basis. In both cases, the seller had breached the terms of the mortgage causing expense and a threat to the underlying title. Throughout this litigation the mortgagee's consistent position was:

> Plaintiff [Appellee Nelson] violated the due-on-sale clause of the mortgage and but for plaintiff's default under the mortgage, Standard would not have incurred these fees. *Standard's memorandum in opposition to Nelson's motion to apportion fees.* (R. 1027-1040, R. 1209-1215.)

Thus, in both this case and *Bell* the due-on-sale clause was violated and the violation caused litigation and expense, but in *Bell* this single equitable consideration was a major[9] factor in depriving the seller of any deficiency judgment, while in this case Petitioner not only had a deficiency judgment awarded against her, but was even assessed the attorneys' fees engendered by the litigation over the due-on-sale clause -- litigation to which she was not a party. These results are contradictory to the point of having no rational underpinning, nor statutory or legal basis. It is to prevent such results that some guidelines need to be established in order for due process to be accorded.

4. ***Respondent Made No Attempt To Mitigate Her Damages.***

If equities are the test, it would seem that the Hawaii Court should have looked at the conduct of the parties concerning the property itself but it did not. Here the trial court found that Petitioner used the significant income she derived from the property for the purpose of maintaining it in good condition and making payments (R. 879-900, Paragraphs 80 and 81). There is no evidence Respondent did anything to mitigate her damages, allowing the property to remain vacant for months after foreclosure was granted. Throughout her possession, Petitioner was the party who protected the value of the property in contrast to Respondent who made no such effort. The equities favored Petitioner over the fortunate buyer in *Bell* who did nothing to preserve value.

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9 Due-on-sale clauses require that at the time of any sale of the property the entire mortgage balance be paid off unless the lender consents to an extension in assignment. At the time of this sale, 1980, long-term interest rates were much higher than those under the older mortgage and such consent would not be granted. The Agreement of Sale was used as a device to avoid notifying the lender who, if notified, would have invoked the due-on-sale provisions.

CONCLUSION

Petitioner submits that the result of this case, in which Petitioner ended up losing over $161,000,[10] and the property, while Respondent ends up with a large profit, interest and having her fees paid for problems she, not Petitioner, caused is not equitable or right. If it is, the Hawaii Court's decision in *Bell* makes no sense at all. The contrast between the two decisions leaves Hawaii case law governing deficiency judgments without any rhyme or reason, and ignores the only statutes that seem to apply. Due process demands law that is not based solely upon standardless decisions by a trial judge or appellate court. Unfortunately, that is the state of Hawaii's deficiency judgment law at present. Certiorari should be granted.

Respectfully submitted,

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10 The deficiency judgment of $110,089.61 plus amounts paid on the agreement of sale by Respondent of $51,454.60 (R. 879-900, Paragraph 78).

CERTIFICATE OF SERVICE

I hereby certify that on this 29th day of August, 1988, five copies of the Petition for Writ of Certiorari were mailed, postage prepaid, to Robert E. Nowland, 737 Bishop Street, Honolulu, Hawaii 96813. I further certify that all parties required to be served have been served.

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APPENDIX A

NO. 11899
IN THE INTERMEDIATE COURT OF APPEALS
OF THE
STATE OF HAWAII

ELIZABETH STEPHENS NELSON, Plaintiff-Appellee, vs. LUCILLE J. BOSTON, Defendant-Appellant, and STANDARD FEDERAL SAVINGS AND LOAN ASSOCIATION, a federal corporation, Defendant-Appellee, and ASSOCIATION OF APARTMENT OWNERS OF NAPILI SHORES, an unincorporated Condominium association, by its Board of Directors, Intervenor/ Defendant-Appellee, and LUCILLE J. BOSTON, Third-Party Plaintiff-Appellant, vs. THE McCORMACK CORPORATION, a Hawaii corporation, and FOSTER HULL, a real estate salesperson and broker, Third-Party Defendants-Appellees.	) CIVIL NO. 5281(1) [MEMORANDUM) OPINION]

MEMORANDUM OPINION

In this action by Plaintiff-Appellee Elizabeth Stephens Nelson (Nelson) to foreclose an agreement of sale (Agreement) in which she was the vendor and Defendant-Appellant Lucille J. Boston (Boston) was the vendee, Boston appeals and argues that the deficiency judgment against her is excessive.[11] We affirm. We find the following to be the only issues raised by Boston worthy of brief discussion.

1.

Citing the law in other jurisdictions, notably California, Boston argues that no deficiency judgment should be entered against her at all. The argument is utterly without merit. *California Federal Savings and Loan Ass'n v. Bell*, 6 Haw. App.____, 735 P. 2d 499 (1987).

2.

Boston is liable under the terms of the Agreement for all of Nelson's costs of enforcement, including reasonable attorney fees. *Smothers v. Renander*, 2 Haw. App. 400, 633 P.2d 556 (1981). Nelson was successful both in prosecuting her claim and defending against Boston's counterclaim. Consequently, she was entitled to attorney fees for both actions, *Rodrigues v. Chan*, 5 Haw. App. 603, 705 P.2d 67 (1985), and the amount awarded to her for those two claims is reasonable and is less than the 25% limit under Hawaii Revised Statutes (HRS) § 607-17 (1985). We find no abuse of discretion in the fact that the award to Nelson included fees for her attorney in Washington where Nelson resides.

3.

The Association's costs and fees, contrary to Boston's argument, are governed not by § 607-17, *supra*, but by HRS § 514A-94 (1985). That latter statute entitles the Association to recover *all* of its costs and a reasonable attorney fee for its successful effort to collect the monthly assessments and taxes against the apartment. Under the

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1 Boston's appeal as to Defendant-Appellee Standard Federal Savings and Loan Association, Intervenor/Defendant-Appellee Association of Apartment Owners of Napili Shores, and Third-Party Defendants-Appellees The McCormack Corporation and Foster Hull was dismissed by "Stipulation for Partial Dismissal of Appeal" filed on December 21, 1987. Consequently, Plaintiff-Appellee Nelson is the only appellee left in this appeal.

Agreement Boston assumed responsibility for those assessments and taxes, and the lower court properly charged the costs of collecting them to her rather than Nelson as Boston contends.

4.

Boston is liable to Standard Federal Savings and Loan Association (Standard) for its reasonable attorney fees and costs, since her default triggered the action for foreclosure in which, under HRS § 667-2 (1985), Nelson was required to join Standard as the mortgagee. *Uyemura v. Wick*, 57 Haw. 102, 551 P.2d 171 (1976). In the light of the extensive proceedings in this case, we find the court acted within its discretion in the amount of its award to Standard. *Sharp v. Hui Wahine, Inc.*, 49 Haw. 241, 413 P.2d 242 (1966).

Boston's argument that at least part of Standard's attorney fees and costs should be borne by Nelson because Nelson violated a mortgage provision prohibiting Nelson's sale of the property during the life of the mortgage without Standard's consent is without merit. It was Boston's default that brought Standard into the suit, not the mortgage violation. If Boston had performed her part of the Agreement, Standard would have been paid and would have had no complaint.

Affirmed.

DATED: Honolulu, Hawaii, April 19, 1988.

Lucille J. Boston,
appellant, *pro se*.
Robert E. Rowland
(Michele Y. Matsuo and
Laurie A. Loomis with
him on the brief; Case
& Lynch, of counsel)
for appellee Nelson.

/s/ James S. Burns
/s/ Walter M. Heen
/s/ Harry T. Tanaka

APPENDIX B

NO. 11899

IN THE INTERMEDIATE COURT OF APPEALS
OF THE
STATE OF HAWAII

ELIZABETH STEPHENS NELSON, Plaintiff-Appellee, vs. LUCILLE J. BOSTON, Defendant-Appellant, and STANDARD FEDERAL SAVINGS AND LOAN ASSOCIATION, a federal corporation, Defendant-Appellee, and ASSOCIATION OF APARTMENT OWNERS OF NAPILI SHORES, an unincorporated Condominium association, by its Board of Directors, Intervenor/ Defendant-Appellee, and LUCILLE J. BOSTON, Third-Party Plaintiff-Appellant, vs. THE McCORMACK CORPORATION, a Hawaii corporation, and FOSTER HULL, a real estate salesperson and broker, Third-Party Defendants-Appellees.	) CIVIL NO. 5281(1) [MEMORANDUM) ORDER DENYING) MOTION FOR)RECONSIDERATION])))))

MEMORANDUM ORDER DENYING MOTION FOR RECONSIDERATION

Upon consideration of Defendant-Appellant's Motion for Reconsideration filed on May 6, 1988, and the arguments in support thereof, the motion is hereby denied.

DATED: Honolulu, Hawaii, May 10, 1988.

David F. Simons
on the motion for
defendant-appellant.

/s/James S. Burns
/s/Walter M. Heen
/s/Harry T. Tanaka

APPENDIX C

NO. 11899

IN THE SUPREME COURT OF THE STATE OF HAWAII

ELIZABETH STEPHENS NELSON, Respondent-Appellee, vs.	) CIVIL NO. 5281(1)) APPLICATION FOR) WRIT OF) CERTIORARI
LUCILLE J. BOSTON, Petitioner-Appellant, and	) INTERMEDIATE) COURT OF)APPEALS)HONORABLE
STANDARD FEDERAL SAVINGS AND LOAN ASSOCIATION,a federal corporation, Defendant-Appellee, and	) JAMES S. BURNS,)WALTER M.HEEN) AND HARRY T.) TANAKA, JUDGES
ASSOCIATION OF APARTMENT OWNERS OF) NAPILI SHORES, an unincorporated) condominium association, by its) Board of Directors, Intervenor/ Defendant-Appellee, and	))))
LUCILLE J. BOSTON, Third-Party Plaintiff-Appellant, vs.	))))
THE McCORMACK CORPORATION, a Hawaii) corporation, et al.,	[ORDER]))
Third-Party Defendants-Appellees.	)))

ORDER

Petitioner's Application for Writ of Certiorari filed May 20, 1988 is hereby denied.

DATED: Honolulu, Hawaii, May 31, 1988.

FOR THE COURT:

David F. Simons,
for the writ

/S/ Herman T.F. Lum
Chief Justice